STATE OF MICHIGAN

IN THE SUPREME COURT

INNOVATION VENTURES, LLC f/d/b/a LIVING ESSENTIALS, a Michigan Limited Liability Company,

Plaintiff-Appellant,

v

LIQUID MANUFACTURING, LLC, a Michigan Limited Liability Company, K & L DEVELOPMENT OF MICHIGAN, LLC, a Michigan Limited Liability Company, LXR BIOTECH, LLC, a Michigan Limited Liability Company, ETERNAL ENERGY, LLC, a Michigan Limited Liability Company, ANDREW KRAUSE, an individual, and PETER PAISLEY, an individual,

Defendants-Appellees.
/

Supreme Court No. 150591

Court of Appeals No. 315519

Oakland County Circuit Court
Case No. 12-124554-CZ

Hon. Phyllis C. McMillen

John J. Bursch (P57679)
Matthew T. Nelson (P64768)
WARNER NORCROSS & JUDD LLP
900 Fifth Third Center
111 Lyon Street, N.W.
Grand Rapids, Michigan 49503-2487
616.752.2000

E. Powell Miller (P39487)
Kevin F. O'Shea (P40586)
Emily H. Hughes (P68724)
THE MILLER LAW FIRM, P.C.
950 West University Drive, Suite 300
Rochester, Michigan 48307
248.841.2200

Attorneys for Plaintiff-Appellant

Thomas P. Bruetsch (P57473)
BODMAN PLC
6th Floor at Ford Field
1901 St. Antoine
Detroit, Michigan 48226
313.259.7777

Attorneys for Defendants-Appellees

Peter Paisley
Pro Se
305 Westwood Avenue
Ann Arbor, Michigan 48103

APPELLANT INNOVATION VENTURES, LLC'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

State Cases

Federal Cases

State Rules

RECEIVED by MSC 12/2/2015 2:22:50 PM

INTRODUCTION

The Court of Appeals held that the Equipment Manufacturing and Installation Agreement ("EMI") and Nondisclosure Agreement are void because the parties' business relationship did not continue for a substantial period. Despite this Court's directive to brief the issue (7/1/15 Order), Defendants do not defend the Court of Appeals' erroneous rationale. Instead, they argue that Innovation Ventures failed to preserve this issue—which the Court of Appeals raised *sua sponte* in its opinion—and press facts inconsistent with the record. The Court should reverse the Court of Appeals and hold that the EMI and the Nondisclosure Agreement are enforceable.

As for the enforceability of the parties' non-compete agreements, Defendants continue to conflate the standards for evaluating non-compete agreements in the employment versus the commercial contexts. What remains true is that Innovation Ventures had the right to simply keep its bottling equipment and not let anyone use it. Innovation Ventures, having allowed limited competition, is not required to permit unfettered competition. The Court should reverse the Court of Appeals and hold that the Termination Agreement is enforceable as well.

CLARIFICATION OF THE RECORD

When resolving a summary-disposition motion, courts consider the evidence in the light most favorable to the non-moving party. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Defendants elide this fundamental rule from their statement of the standard of review (Appellees' Br 19), and elude the rule's requirement throughout their factual recitation.

Defendants did not need to use Innovation Ventures' equipment to bottle their competing products. (Contra Appellees' Br vii, 1, 11, 27, 29.) Defendants cite the affidavit of Innovation Ventures' president, Scott Henderson, who testified that in 2007, no one *sold* a "turnkey" energy-shot-manufacturing line, so Innovation Ventures constructed its own line. (Henderson

Aff ¶ 15, App 228a.) Henderson did *not* say there were no complete bottling systems for energy shots available in 2010 (Innovation Ventures already had many competitors), much less that using Innovation Ventures' equipment was the only way to bottle energy drinks. Eternal Energy could have gone elsewhere, provided it was consistent with Krause's contractual obligations.

Several additional points require a more cursory rebuttal:

- Krause and K&L had access to and obtained significant confidential information about 5-hour ENERGY, including pricing, profits, costs, suppliers, and processes. (Henderson Aff ¶ 9, App 225a-227a.) Defendants claim that Krause did not receive any confidential information. (Appellees' Br 3, 22.) The former must be taken as true for purposes of this appeal.

- Defendants contend that K&L and Krause "understood that [Innovation Ventures] would order 'between four and six' new machines" under the parties' agreements, but that the agreements were terminated on May 10, 2009. (Appellees' Br 6.) Neither proposition is supported by record evidence, so Defendants cite their briefs in the trial court "verified by" Krause's affidavits in which Krause swears that every fact in the briefs is true. (*Id.*) But assertions of counsel in a brief are not evidence, even if vouched for by the client.[1]

- Innovation Ventures did not have to require Liquid to obtain broad confidentiality agreements from customers that produced competing energy drinks because the Termination Agreement already prohibited Liquid from sharing any information about its work for Innovation Ventures with its customers. (Compare Appellees' Br 9 with Termination Agreement § 2, App 102a-103a.)

- Innovation Ventures did not try to "crush" Eternal Energy when it learned that Eternal Energy was trying to do business with Wal-Mart. (Contra Appellees' Br 12.) Instead, Innovation Ventures went back to Liquid to make sure Eternal Energy executed a nondisclosure agreement. (4/20/2011 email from Kulpa to Criso, App 150a.) Only after Liquid failed to produce that nondisclosure agreement—and after Innovation Ventures learned that Krause had breached his contract—did Innovation Ventures sue to enforce its contract rights.

[1] MCR 2.119(B)(1) requires that affidavits "state with particularity facts admissible as evidence establishing or denying the grounds stated in the motion" and "show affirmatively that the affiant . . . can testify competently to the facts stated in the affidavit." Affidavits that purport to verify the accuracy of the factual allegations in a brief do not set forth particular facts or demonstrate the affiant's competency to testify as to those facts, and courts routinely reject such affidavits. E.g., *Papazian v Lichtman*, No 180755, 1996 WL 33359823, at *3 (Mich Ct App, Sept 6, 1996); *Jones v Reno Hilton Resort Corp*, 889 F Supp 408, 411-412 (D Nev, 1995); see *Shoemaker v Ridgeview Indus, Inc*, No 311345, 2013 WL 4034507, at *3 (Mich Ct App, Aug 8, 2013).

- When Innovation Ventures sued, it was not required to first provide Liquid with the opportunity to cure, because the cure provision only applied to Innovation Ventures' right to de-certify a permitted product. (Termination Agreement § 1(a), App 101a; contra Appellees' Br 9.) Moreover, Liquid could not cure, having secretly produced various competing products for months without complying with the terms of the contract. See *Giuffre Hyundai, Ltd v Hyundai Motor Am*, 756 F3d 204, 209 (CA 2, 2014) (egregious breach renders right to cure useless).

- Innovation Ventures does not "dominate" the liquid energy market category. (Contra Appellees' Br vii, 3.) A 2014 article reports that Innovation Ventures' 5-Hour ENERGY has less than a third of the market share of competitors Monster and Red Bull. See http://tinyurl.com/liquid-energy-mkt.

- While Innovation Ventures' patent identifies product ingredients (Appellees' Br 11 n5), it does not disclose the precise amounts of each ingredient, which is additional proprietary information to which Defendants had ready access.

Finally, Defendants continue to rely on inadmissible hearsay and selective quotations to besmirch Innovation Ventures and its founder. For example, even though Innovation Ventures preemptively challenged the admissibility *and the truthfulness* of the *Forbes* article (Appellant's Br 18 n2), Defendants again quote the article without explaining how the article is admissible or accurate (Appellees' Br 13-14). Contra MCR 2.114; Mich R Prof'l Conduct 3.1. Likewise, Defendants continue to crop most of Innovation Ventures' interrogatory response to give the misimpression that Innovation Ventures' only intent in limiting who could use its specialized bottling equipment was to prevent competition, when the full response makes clear Innovation Ventures' intent was to *allow* limited competition, consistent with Innovation Ventures' interest in protecting its goodwill and confidential information. (Compare Appellees' Br 15–16 with Appellant's Br 42.) And left unexplained is how this purported "intent" can be squared with Innovation Ventures including Red Bull—Innovation Ventures' largest competitor—in the list of permitted products that Liquid was allowed to produce using Innovation Ventures' bottling system. (Termination Agr, Ex C, App 114a.)

REPLY ARGUMENT

I. The Nondisclosure Agreement and the EMI do not suffer from a lack of consideration.

The Court of Appeals' failure-of-consideration analysis is indefensible under Michigan law. Michigan law promotes parties' freedom to contract. *Zahn v Kroger Co of Mich*, 483 Mich 34, 46; 764 NW2d 207 (2009). Expanding the failure-of-consideration doctrine to apply when judges feel that the parties' relationship did not last long enough undermines that liberty. The Court should hold that where continuation of a business relationship is consideration for a contract, the issue of whether the relationship continued for a sufficient duration is one of breach to be determined based on the contract itself, not judicial determinations of the adequacy or failure of consideration. This is of fundamental importance to commercial relationships.

Because the failure-of-consideration analysis applied by the Court of Appeals is after-the-fact judicial review of the adequacy of consideration, other states have adopted it solely in the context of employment relationships to address the potentially disparate effect of non-compete provisions on at-will employees. (See COA Op 11-12, App 364a-365a (citing employment cases).) This case does not involve employment, as Defendants concede. (Appellees' Br 33.)

Defendants do not defend the Court of Appeals' actual reasoning and do not contest the following: the Court of Appeals' analysis is inconsistent with the freedom to contract; failure of consideration is not available to protect a party against known risks; the remedy for failure of consideration is rescission of the entire contract and the return of the parties to their status before contracting; failure of consideration cannot be applied to contract modifications; the EMI and the Non-disclosure Agreement memorialize and modify the parties' existing oral contract; and Krause and K&L received adequate consideration for the contract as a whole dating back to 2007. Together, these uncontested rules and facts show the Court of Appeals should be reversed.

Defendants' arguments are desultory. *First*, Defendants argue that Innovation Ventures failed to preserve the issue of failure of consideration. (Appellees' Br 29-31.) But the Court of Appeals introduced the issue *sua sponte* after rejecting the trial court's lack-of-consideration analysis. (COA Op 10, App 363a.) If any party failed to preserve, it is Defendants who failed to plead failure of consideration as an affirmative defense. See MCR 2.111(F)(3)(a).[2]

Second, Defendants argue that the Court cannot construe the EMI and the Nondisclosure Agreement together because Krause, K&L's principal, did not sign the Nondisclosure Agreement in his individual capacity. (Appellees' Br 31-32.) Defendants ignore that the two contracts were executed together as part of a single transaction, both define "confidential information" in much the same way, and both refer to Krause and K&L's continuing obligations.

Third, Defendants want the Court to believe that Krause and K&L never received what they were promised: "the construction of 4-6 new machines."[3] (Appellees' Br 33.) This is twice false. The EMI identifies exactly what Krause and K&L were promised, $153,000 to develop, manufacture, and install *one* production line; K&L and Krause agreed they were promised nothing more. (EMI §§ 1-3, 20, Sched B, App 76a-80a, 85a, 88a.) Further, the EMI shows that Krause and K&L had already been working on the production line for several weeks at the time of termination (*id.* at Sched D, App 92a), and it is reasonable to infer that Krause and K&L received the promised installment payments because they have not sued to recover the money.

Fourth, Defendants admit the Court of Appeals was actually imputing bad faith to Innovation Ventures. (Appellees' Br 34.) Yet, because of truncated discovery, the record is

[2] Innovation Ventures is also entitled to seek review of the Court of Appeals' decision without first bringing a motion for reconsideration. *Penobscot Indian Nation v Key Bank of Maine*, 112 F3d 538, 563 (CA 1, 1997); *United States v Williams*, 97 F App'x 613, 614 (CA 6, 2004).

[3] For this, Defendants cite assertions of counsel "verified by" one of Krause's affidavits. (Appellees' Br 6.) As discussed above, this is not evidence.

silent as to *why* the parties ended their relationship when they did. Summary disposition cannot be granted based on unsupported speculation. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). It is never bad faith for a party to exercise its contract rights. *Eastway & Blevins Agency v Citizen Ins Co of Am*, 206 Mich App 299, 302-303; 520 NW2d 640 (1994). And even if Defendants could prove Innovation Ventures ended the contract one day early, they may have established breach—not failure of consideration. See *Abbate v Shelden Land Co*, 303 Mich 657, 666; 7 NW2d 97 (1942) (appropriate remedy is damages, not rescission).

The Court of Appeals' expansion of the failure-of-consideration doctrine should be rejected, and the case remanded to the trial court.

II. The non-compete provisions in the parties' agreements do not unreasonably restrain trade.

This case arose after Defendants learned the most confidential details of Innovation Ventures' business, exploited that information, and used Innovation Ventures' own equipment to manufacture competing products—all in direct violation of agreements not to do so, which Defendants willingly signed. After being caught, Defendants claim it is inconsistent with fair competition for Innovation Ventures to have obtained their agreement not to use Innovation Ventures' information and equipment to compete against Innovation Ventures. Not so the law.

Defendants do not cite a single case where a manufacturer agreed to allow limited, competitive use of its own equipment, and a court held that agreement to be an unlawful restraint of trade because it did not allow unfettered competitors' use of the equipment. There is no question that Innovation Ventures could have lawfully enforced the three-year exclusivity provision in the Amended Manufacturing Agreement or refused to allow Liquid to produce *any* competitors' products in the Termination Agreement. And it is undisputed that the Termination Agreement did not limit competition as a whole or even prevent Eternal Energy from competing.

At its most basic level, Michigan law does not bar agreements that have a pro-competitive effect. See *Continental T V, Inc v GTE Sylvania Inc*, 433 US 36, 59 (1977).

Defendants' remaining arguments are off the mark. *First*, this is not a case where an employee's know-how is at issue. (Contra Appellees' Br 21.) None of the Defendants were Innovation Ventures' employees. (See *id.* at 33.) Krause is the only individual who executed a non-compete. (EMI § 10, App 83a.) And his non-compete has never been declared invalid.[4]

Second, Defendants' argument that employee non-competes and commercial exclusivity provisions are analyzed the same renders MCL 445.774a duplicative of MCL 445.772. (Appellees' Br 24.) Such interpretations are highly disfavored. E.g., *Hannay v Dep't of Transp*, 497 Mich 45, 57; 860 NW2d 67 (2014). The natural reading of MCL 445.774a is that the Legislature intended to impose higher, specific requirements for non-competes in the employment context while applying the rule of reason more generally to commercial transactions.

Third, the Termination Agreement serves a legitimate business purpose because it promotes limited competition. (Contra Appellees' Br 21.) Indeed, Innovation Ventures pre-approved the use of its equipment to manufacture products for Red Bull, Innovation Ventures' much larger competitor. In the absence of the relaxed exclusivity provision in the Termination Agreement, *no* competitors would have been able to use Innovation Ventures' equipment to manufacture competing products. This is normal; a company does not usually allow a competitor to use its equipment to manufacture any competing products.[5]

---

[4] Defendants again claim that there is no dispute that Krause abided by his non-compete agreement. (Appellees' Br 29 n7.) They are wrong. (2d Am Compl ¶ 96.c., App 38a.)

[5] Perhaps because K & L is apparently defunct, the Court of Appeals did not address whether the non-compete provision in the Non-disclosure Agreement violated MARA. But there is no dispute that protecting confidential information and preventing competitors from obtaining unfair use of a company's trade secrets is a legitimate purpose for a non-compete. *Follmer, Rudzewicz & Co, PC v Kosco*, 420 Mich 394, 402-404; 362 NW2d 676 (1984).

Fourth, it is entirely possible to bottle competing products without using Innovation Ventures' equipment. Defendants were free to find another bottler, consistent with their agreements. And, to be clear, Innovation Ventures maintained an ownership interest in the equipment until late 2011 (Appellant's Br 14), well after Defendants violated the non-compete.

Fifth, none of the cases Defendants cite support the proposition that the relaxed exclusivity provision in the Termination Agreement was an unlawful restraint on trade. This is readily inferred from Defendants' use of cases for isolated quotes, rather than application of the courts' analysis. Unlike the present dispute, Defendants' cited cases involved monopolistic conduct that was intended to and did restrict competition. For example, in *United States v Microsoft*, 253 F3d 34 (DC Cir 2001) (*en banc*), the government charged that Microsoft used its monopoly in the PC operating-system market to unlawfully monopolize the internet-browser market as well. In *Aspen Skiing Co v Aspen Highlands Skiing Corp*, 472 US 585 (1985), the owner of three Aspen-area resorts refused to participate in a long-standing tradition of including the fourth Aspen resort in a promotional, interchangeable 6-day ski pass for the purpose of stifling competition. In *Lorain Journal Co v United States*, 342 US 143 (1951), a newspaper tried to destroy a radio station by refusing to deal with anyone who advertised on the radio. None of these cases involved conduct that actually promoted competition, as is the case here.

Defendants' reliance on patent and copyright cases is especially inapt. Patents and copyrights allow the creation of lawful monopolies for the purpose of promoting competition. The world at large is prohibited from recreating the patented or copyrighted object. Here, the Termination Agreement did nothing to prevent Innovation Ventures' competitors from creating their own production equipment. It merely limited which competitors could use Innovation Ventures' own production equipment to compete with Innovation Ventures itself.

Innovation Ventures cannot be accused of seeking to leverage its market position to destroy competitors. Innovation Ventures chose to provide assistance to certain competitors—assistance it was not required to provide—but declined to assist *all* competitors. This is a far cry from agreements to create an unlawful cartel, *United States v Citizens & S Nat'l Bank*, 422 US 86 (1975), or to fix resale prices, *Monsanto Co v Spray-Rite Serv Corp*, 465 US 752 (1984).

Finally, Defendants fail to meaningfully distinguish this case from *Staebler-Kempf Oil Co v Mac's Auto Mart, Inc*, 329 Mich 351; 45 NW2d 316 (1951). As Innovation Ventures discussed at pages 36–39 of its opening brief, in *Staebler-Kempf*, a petroleum distributor sold a service station on the condition that the buyer continue to sell the distributor's gasoline at the same price as the distributor's other area stations. This Court upheld the condition because the distributor could have achieved the same result by keeping the property, so there was no anticompetitive effect. 329 Mich at 357-358. And there is no indication that goodwill played any part in the Court's decision; the word is not mentioned in the opinion. (Contra Appellees' Br 28.)

The Defendants and the lower courts seek to treat conduct that promotes competition as an unlawful restraint on trade. The Court should reject such illogic and remand the case for a determination of whether Defendants breached the various non-compete provisions.

III. It is unworkable to require a plaintiff to identify specific trade secrets that were misappropriated before discovery is complete.

Defendants do not contest that discovery is necessary before a plaintiff can identify misappropriated trade secrets. Nor do Defendants disagree that full discovery is crucial because such wrongful activity is typically concealed. And Defendants cannot contest that this case was decided without meaningful document discovery and depositions. Instead, Defendants argue that additional discovery was unnecessary because the bottling process for 5-hour ENERGY was not a trade secret. In making that argument, Defendants do not address the following facts:

- The circuit court granted summary disposition dismissing Innovation Ventures' trade-secret claims even though Defendants' operative motions did not seek relief on that basis and without affording Innovation Ventures the opportunity to identify genuine issues of fact—Defendants' surprise that Innovation Ventures did not identify the need for additional discovery is feigned (see Appellees' Br 35-36);

- The record before the circuit court showed that Innovation Ventures alleged in the Amended Complaint that Defendants misappropriated trade secrets including the methods, techniques, and processes for manufacturing 5-hour ENERGY, and Innovation Ventures' customer and distributor lists (2d Am Compl ¶ 102, App 40a);

- The record also contained affidavits identifying specific trade secrets misappropriated by Krause, Paisley, and Liquid (Dolmage Aff ¶¶ 11, 20, App 237a, 240a-241a; Henderson Aff ¶¶ 8-12, App 225a-228a)—the manufacturing process was not the only trade secret at issue; and

- The record, when viewed in the light most favorable to Innovation Ventures (as is required), supports the conclusion that use of Innovation Ventures' trade secrets gave Krause, Paisley, and their companies the ability to go from selling their competing product to miscellaneous tattoo parlors to a $40 million contract with Wal-Mart in a matter of months (Krause Aff ¶ 13, App 11a).)

The conclusory dismissal of Innovation Ventures' misappropriation of trade secrets claims imposes an impossible burden—with no discovery, identify the *specific* trade secrets misappropriated by contractors who learned *all* the details of a plaintiff's business and started a competing business. That process is not consistent with the administration of justice and would be highly detrimental to all businesses. The Court should reverse and remand for discovery.

CONCLUSION AND REQUESTED RELIEF

The Court of Appeals erred by (1) importing a failure-of-consideration doctrine that is inconsistent with Michigan contract law, (2) holding that an agreement promoting competition is an unenforceable restraint on trade, and (3) endorsing early summary disposition on a claim for trade secret misappropriation before any meaningful discovery has taken place. This Court should reverse each of these erroneous holdings and remand to the circuit court.

Respectfully submitted,

Dated: December 2, 2015

WARNER NORCROSS & JUDD LLP

By */s/ Matthew T. Nelson*

John J. Bursch (P57679)
Matthew T. Nelson (P64768)
900 Fifth Third Center
111 Lyon Street, N.W.
Grand Rapids, Michigan 49503-2487

Attorneys for Appellant Innovation Ventures, LLC

13581443-9